SUPREME COURT, U. S.
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In the
Supreme Court of the United States

October Term, 1969

FEB 24 1970

No. 1121

OFFICE OF THE CLERK
SUPREME COURT, U.S.

CITY OF NEW YORK,

Appellant,

vs.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, and AMERICAN MOTORS CORPORATION,

Appellees.

On Appeal from the United States District Court for the Central District of California.

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES (CALIFORNIA) AND THE AIR POLLUTION CONTROL DISTRICT OF THE COUNTY OF LOS ANGELES, IN SUPPORT OF APPELLANT CITY OF NEW YORK.

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Appellees.

BRIEF AMICUS CURIAE ON BEHALF OF THE COUNTY OF LOS ANGELES (CALIFORNIA) AND THE AIR POLLUTION CONTROL DISTRICT OF THE COUNTY OF LOS ANGELES, IN SUPPORT OF APPELLANT CITY OF NEW YORK.

STATEMENT OF THE CASE

As early as 1953, defendants-appellees (other than the United States of America) and a number of alleged co-conspirators were engaged in a combination and conspiracy in unreasonable restraint of the interstate trade and commerce[1] in motor vehicle air pollu-

[1]Such trade and commerce is described in Section V of the Complaint filed by the United States against defendants-appellees on January 10, 1969. See Appendix B, infra, pp. 20a-21a.

tion control equipment. The combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants-appellees and co-conspirators, the details of which are set out in Appendix B.[2]

A Federal Grand Jury was impaneled in 1966 to investigate the practices of the automotive industry regarding the aforesaid anti-competitive practices. As a result of the evidence assembled by the Grand Jury over an eighteen month period, the United States, on January 10, 1969, filed a civil complaint charging appellees and a number of alleged co-conspirators with violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint essentially charged that an agreement to eliminate all competition in the development of air pollution control equipment had been entered into by and between defendants-appellees and their alleged co-conspirators, and that they had agreed and conspired "to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment."[3]

Defendants-appellees were neither required to nor did they answer the complaint. Rather, a proposed final judgment and stipulation that judgment could be

[2]See Sections VI and VII of the Complaint, Appendix B, infra, pp. 21a-23a, which sections set forth the offenses alleged and the effects attributable to the aforesaid combination and conspiracy.

[3]See Complaint, Section VI, 14(c) (1)-(3), Appendix B, infra, pp. 22a-23a.

entered was filed in the District Court on September 11, 1969.[4] Subsequently, the District Court entered an order setting the matter for hearing on October 28, 1969. At the conclusion of oral argument on the above-mentioned date, the Court denied all applications for intervention and approved the consent decree as submitted by the parties.[5] Judgment was entered on October 29, 1969.

On December 17, 1969, the District Court denied a second application by appellant City of New York for leave to intervene. Thereafter, on December 22, 1969, appellant City filed a notice of appeal in the United States District Court for the Central District of California, alleging appellate jurisdiction in this Court by virtue of 15 U.S.C. § 29.[6] That appeal led to the filing of appellant's Jurisdictional Statement, in support of which this brief *Amicus Curiae* is submitted.

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[4]The Stipulation provided that the United States might withdraw its consent before the expiration of 30 days; thereafter judgment could be entered.

[5]The District Court also denied a motion to consolidate a separate action, filed by Marshall B. Grossman and S. Jerome Tamkin on September 17, 1969, with the action instituted by the United States. Messrs. Grossman and Tamkin have since initiated a separate appeal to this Court, a Jurisdictional Statement on their behalf having been filed sometime prior to the submission of this brief *Amicus Curiae*.

[6]See also *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 131 (1967); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

INTEREST OF AMICUS CURIAE

This brief *Amicus Curiae* is submitted on behalf of the County of Los Angeles (California) and the Air Pollution Control District of the County of Los Angeles, and in support of the Jurisdictional Statement filed with this Court on January 26, 1970, by appellant City of New York.[7] The *amici* here have substantially the same interest as appellant.[8]

There is hardly need to mention the continuing problem air pollution poses for major urban areas such as New York City and the Los Angeles Basin. The urgency of the situation, especially in Los Angeles County, where both the human and the automobile population are increasing rapidly, has never been more obvious. A solution to the control of automobile emissions must be forthcoming early in the new decade.

The County of Los Angeles and the Air Pollution Control District have been actively engaged in the control of air pollution for over two decades. The Air Pollution Control Law of 1947 (CAL. HEALTH & SAFETY CODE), adopted by the California Legislature

[7]Since *amicus* here is a political subdivision of the State of California, letters of consent to filing of this brief, or a motion for leave to file, are unnecessary. U.S. Sup. Ct. Rule 42(4), 28 U.S.C. It is further hoped that the Court will give full consideration to this brief, despite late filing. No notice of this appeal was received until nine days after appellant filed its Jurisdictional Statement. The period since then has been occupied with the writing and printing of this brief. Pursuant to the advice of the office of the Clerk of this Court, typed copies of this brief were served upon all parties prior to the filing of printed copies with the Clerk.

[8]A motion for leave to intervene, submitted by *amici* to the District Court reciting substantially the same grounds as the motion submitted by appellant was denied below.

is recognized and used throughout the nation as a model for effective air pollution control regulations.

The Air Pollution Control District has expended approximately $60,000,000 of public funds since its creation under the Act. Its program, its rules and regulations, and its effectiveness are recognized throughout the nation and the world. No agency, including the State of California and the Federal Government, can claim even to approach the record of the District in the field of air pollution control.

Los Angeles County, with its low wind velocities and frequent temperature inversions, is especially susceptible to air pollution. Emissions of air contaminants from stationery sources are strictly controlled by law; but each day motor vehicles discharge 12,000 tons of hydrocarbons, carbon monoxide, oxides of nitrogen, and other contaminants into the air of the Los Angeles Basin.

The fact that emissions from motor vehicles pollute the air has been known for many years. In the early 1950's the automobile was clearly identified by scientists as the primary cause of the typical Los Angeles photochemical "smog."

These matters were known to the automobile manufacturers, and County officials regularly informed them and communicated with them. The manufacturers neither recognized that they had any responsibility for developing air pollution control devices nor did they make any substantial effort to develop them.

In 1953, the manufacturers entered into the agreements which constituted the alleged combination in restraint of trade. In 1955 the cross-licensing and "most favored purchaser" agreements were made. No devices were produced.

In 1960, the California Legislature, convinced that no progress would be made voluntarily by the manufacturers, adopted statutes which in effect required air pollution control devices on new automobiles. (Stats. 1st Ex. Sess. 1960, Ch. 23). The manufacturers were successful, however, in delaying the "positive crankcase ventilation system" device until 1963 and the exhause control device until the 1966 model.

In recent years, the manufacturers attempted to pull the teeth of the California Legislature by having the United States Congress occupy the field. In this effort they were partially successful. (See: 42 U.S.C. Sec. 1857f-6a)

In the meantime, it became well-established knowledge that air pollution from motor vehicles seriously damaged crops, forest trees, and other property. There was firm evidence in the 1950's that it also aggravated respiratory diseases, such as emphysema. Many thousands of people have been ordered by their physicians to leave Los Angeles because of the effect of air pollution upon their health. There is little doubt that breathing polluted air causes or contributes to the causation of a variety of respiratory diseases.

From its experience, the Air Pollution Control District is convinced that the automobile manufacturers will do only those things in the field of air pollution which they are required by law to do, and that if permitted to do so, they will collectively resist any such regulation.

In the light of the facts alleged by the United States in its complaint,[9] it appears clear that the conspiracy has already accomplished its purpose. No reasonable man would conclude that any such agreement could forever protect the industry. Its sole purpose must have been to accomplish one thing—delay. Obviously, it has succeeded. The monetary gain to the industry from the delay must be estimated in billions of dollars. The resulting irreparable damage to the public cannot even be estimated. The County and the public are justly concerned about the fact that the automobile industry appears to have committed a serious and calculated act of fraud in violation of federal law, and to have escaped any penalty for having done so. The judgment entered below does no injury to the defendants. It merely protects them from a public trial which would reveal the details of the conspiracy alleged, not only to the public and a concerned Congress, but also to those private individuals and public agencies which have just and lawful claims against the alleged conspirators. Indeed, the challenged consent judgment may be worth as much in dollars to the industry as the original delay.

[9]See Appendix B pp. 21a-23a

It will be our purpose, in this brief, to show, first, that the consent judgment entered below frustrates the ability of private litigants to obtain the information which the United States Attorney General and the Federal Grand Jury were able to obtain; second, that the decree fails to provide safeguards necessary to promote the Congressional purpose of assisting individual litigants; and third, that the particular consent judgment in this case is not in the public interest.

ARGUMENT

I. INTRODUCTION.

The entry of a consent decree in antitrust cases is a judicial function, the force of which is not to adjudicate the merits of the contested issues posed by the Government's complaint, but rather to decide whether or not the court should exercise its equity powers in such a fashion as to make the provision of the proposed "settlement" between the Government and the defendants a decree of the court.[10] It appears to be the general view that the public interest is most often served by judicial approval of such decrees.[11] Nevertheless, "it is the court's duty to protect the rights of persons who are not parties to the action and, of course, the decree should not be approved if it is contrary to the public interest."[12] Consequently, where "countervailing con-

[10] *United States v. Carter Products Co., Inc.*, 211 F. Supp. 144, 148 (S.D. N.Y., 1962).

[11] Id.

[12] See Appendix A. Opinions of the District Court, Oral Opinion, at p. 3a.

siderations of a substantial nature are present, a court would be justified in refusing to enter such a decree.[13] There are several factors which suggest that in this case the consent judgment should not have been approved.

Consent decrees have been a traditional mechanism for the settlement of antitrust controversies without the burden of protracted litigation. As such they have justly received validation by this Court.[14] The theory behind such judgments has been that the decree itself, if properly drafted, will meet the anti-competitive practices alleged in the complaint and thus protect the public interest via the maintenance of unrestricted market forces. The approval by the District Court of the consent decree here in question was evidently grounded on this rationale.[15]

The public interest, however, is not protected by a consent decree entered in a case where such interest is obviously more than economic.[16] Increased air pollution leads to increased "social costs", such as respiratory disease and crop damage,[17] the implications of which should be considered "countervailing consider-

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[13]211 F. Supp. 144, 148, *supra*.

[14]*Swift & Co. v. United States*, 276 U.S. 311 (1928).

[15]See Appendix A, infra, Oral Opion, at p. 5a. Memorandum Opinion, pp. 13a-14a.

[16]Most activity in our society, of course, can be said to have economic implications. Reference here is made to the more precise concept of market economics with which antitrust legislation has traditionally dealt.

[17]A more detailed discussion of the effects of air pollution appears in the section of this brief entitled "Interest of Amicus Curiae", beginning at p. 5

ations of a substantial nature." Furthermore, it is not clear in a case such as this that the Federal Government is the only arbiter of the public interest. California, for example, has established far-reaching statutory authority to allow local agencies to deal with air pollution.[18] In fact, it would appear that the public interest could not possibly be served where the United States vigorously opposes the intervention of other responsible public bodies,[19] especially where the social effects of the decree which it authored are so obvious.

II. THE CONSENT JUDGMENT FRUSTRATES ACCESS TO THE FACTS OF THE ALLEGED CONSPIRACY.

It was strongly contended below that any person with an action pending will be able to secure the same information which the United States Attorney General and the Federal Grand Jury were able to obtain, through discovery proceedings. This argument is without merit.

The federal investigation of this matter continued over a period of approximately two years, with the Grand Jury in session over 18 months. The acts of the alleged conspiracy investigated took place over a per-

[18] See CALIFORNIA HEALTH & SAFETY CODE, Sections 24198-24341.

[19] The United States filed a 28 page brief with the District Court on October 17, 1969, responding to and opposing the various applications to intervene, including detailed comments in support of the then proposed consent decree. Intervenors included, among others, the City of New York and the *amici*.

iod of at least 12 years (1953-1965), and perhaps over a longer period.

All of the powers of the Department of Justice and of the Grand Jury were available to the investigators, and we understand that they were used. How many witnesses were called we do not know, but judging from the time expended there must have been a great many. We do know that the documents examined numbered at least several hundred. Those which the Attorney General thought important enough to name required 22 pages of legal-sized paper just to list.

The facts of an antitrust case are difficult enough for the non-federal attorney to obtain. Here, where the alleged conspiracy is in essence an agreement not to develop a product, and to avoid regulation, the relevent facts will be difficult to identify, not to mention difficult to find. The cost of attempting to duplicate the federal investigation would be astronomical in time and money.

Furthermore, the decree contains neither a limited admission of guilt[20] nor is there any provision for releasing the documents to private litigants. If nothing else, the omissions in the decree demonstrate that the United States did not adequately represent the appellant or the *amici* herein.

[20]Reference here is made to the use of an "asphalt clause," urged below by appellant and *amici*. See *United States v. Lake Asphalt & Petroleum Co. of Mass.*, 1960 Trade Cas., par. 69,835 (D. Mass. 1961); *United States v. Allied Chemical Corp.*, 1961 Trade Cas., par. 69,923 (D. Mass. 1960); *United States v. Bituminous Concrete Assoc.*, 1961 Trade Cas., par. 69,878 (D. Mass. 1960); *The Government and the Private Antitrust Suit*, Dept. of Justice Release, December 11, 1969, p. 13.

In summary, there is no merit to the contention that the consent decree does not hamper, if not preclude, discovery of the facts of the alleged conspiracy. No one can assert that there is more than a possibility that the relevant facts would be revealed. This is not enough.

III. THE DECREE FAILS TO PROVIDE SAFEGUARDS NECESSARY TO PROMOTE THE CONGRESSIONAL PURPOSE OF ASSISTING INDIVIDUAL LITIGANTS.

In its scheme for enforcement of the antitrust laws, Congress contemplated both federal and individual actions to achieve the broad social object of the statute. *New Jersey Woodfinishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F.2d 346, 350-351 (3rd Cir., 1964), aff'd. 381 U.S. 311 (1965); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir., 1955); see also, MacIntyre, "*The Role of the Private Litigant in Antitrust Enforcement*," 7 Antitrust Bull. 113 (1962).[21]

This scheme of public and private enforcement was contained in the original enactment of the Sherman Act in 1890 and has since been strengthened by the passage of the Clayton Act in 1914 and in subsequent amendments in 1955.

[21] A. Everett MacIntyre, Commissioner, Federal Trade Commission.

The enactment of private treble damage provisions in the Act made the public an ally of the federal government and the private suit a substantial weapon of national antitrust policy. Professor Phillip Areeda, of the Harvard Law School and a specialist in Antitrust law, remarked as follows:

> "Such a remedy not only compensates private persons for their injuries, but gives them a powerful financial incentive to enforce the antitrust laws. The result is that public enforcement, which is inevitably selective and least likely to concern itself with local, episodic, or less than flagrant violations, is supplemented by private enforcement, which increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct. Some antitrust violators have found the cost of violation to be very high, even though treble damage payments are a deductible business expense for Federal income tax purposes . . . ."[22]

Other authorities in the antitrust field concur. Professors Carl Kaysen and Donald F. Turner further note:

> ". . . Private suits are becoming more of an important supplementary enforcement device. They may be the most effective way of policing the multitude of comparatively local and insignificant violations that will tend to escape the glance of

[22] P. Areeda, *Antitrust Analysis* (1967), Little, Brown and Company, Boston, 1967, at pp. 35-36.

> federal enforcement authorities or that, even if noticed, do not merit the expenditure of limited enforcement resources. Moreover, the prospect of private damage suits is a growing deterrent to illegal conduct, although the difficulties of proving damages remain very great in most situations."[23]

The enactment of Section 5 of the Clayton Act and its later amendment (15 U.S.C. par. 16a and b) have been interpreted by the Supreme Court as an expression of Congressional intent to ". . . use private self-interest as a means of enforcement of the antitrust laws." *Bruces Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947), and that private parties were to be given the benefits of prior government suits. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311, 317-318 1965); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 567-568 (1951); *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 784-785 (3rd Cir., 1967), affirmed in part, reversed in part, 392 U.S. 481 (1968); *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F. Supp. 540, 542 (E.D.Pa., 1967); *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, 834 (E.D.Mich., 1963). The historic intent of Congress to utilize private suits as a method of achieving effective antitrust compliance was well-expressed by President Woodrow Wilson in

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[23]C. Kaysen and D. F. Turner, *Antitrust and Legal Analysis*, Harvard University Press, Cambridge, 1965, at p. 257.

1914 when he urged the Congress to facilitate the interaction of private and government actions by:

> ". . . giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit. . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience."[24]

In 1955, Congressman Wright Patman echoed President Wilson's statement when he stated to the House Antitrust Subcommittee:

> ". . . You and I have recognized that we need a strong and effective antitrust policy to preserve competition. We have recognized that a necessary and integral part of any such policy is full and effective enforcement of our antimonopoly laws. For many years it has been recognized that the Government alone is not able to provide all of the necessary enforcement. The help of all citizens is

[24] Woodrow Wilson, "Special Address Delivered at a Joint Session of Congress," January 20, 1914, Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, p. 7918, as quoted in MacIntyre, *"The Role of the Private Litigant in Antitrust Enforcement,"* 7 Antitrust Bull. 113, 119-120 (1962).

needed. We know that private parties will help in this endeavor if we afford them rightful opportunities. In other words, we can expect this help if we give them the right to proceed, and see to it that they are treated reasonably respecting recoveries of damages and costs of litigation."[25]

The Senate Committee report on proposed amendments to Section 5 of the Clayton Act states:

"At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble-damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act. . . .

"Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful government action, so that the judgments and decrees in the federal proceedings could be used to establish a case. *Amassing evidence for antitrust cases would otherwise be a prohibitively*

[25]Statement of Rep. Wright Patman before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives on H.R. 10243, August 6, 1958, Id. at 115-119.

expensive task for most plaintiffs. (S. Rep. No. 619, 84th Cong., 1st Sess., June 21, 1955; U.S. Code Cong. & Ad. News. 2329 (1955)) (Emphasis added).

The Supreme Court in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, (1951) examined the history of the policy that assistance to private litigants from government action was to be encouraged as a significant factor in compelling obedience to the antitrust laws. The Court stated:

> "Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress 'agree in giving private individuals . . . the right to found their [antitrust] suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has . . . sued the combinations complained of and won its suit. . . .' 51 Cong. Rec. 1964. Congressional reports and debates on the proposal which ultimately became par. 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions. . . ."

In *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, (E.D. Mich. 1963), the Court discussed the policy of the antitrust laws with respect to private treble damage actions:

> "The purpose of Section 4 of the Clayton Act, Title 15, U.S.C., par. 15, which provides for pri-

vate triple damage suits is 'to enlist "the business public . . . as allies of the government in enforcing the antitrust laws;" the means chosen, on the other hand is to give the "injured party ample recompense for the wrong suffered" allowing three-fold recovery of damages.' Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 378 (1955). 'In other words,' the private antitrust suit is a substantial weapon in effectuating a national policy of protecting, preserving and promoting free competition in the marketplace by blending 'antitrust policy with private compensatory law.'" (215 F. Supp. at 834)

The actions of appellant and *amici*, via their applications to intervene in the District Court, represented the blend of public and private enforcement activities contemplated by Congress.

This consent decree frustrates the Congressional purpose by substantially eliminating the possibility of private suits. Rather than assisting private plaintiffs, the decree requires them to duplicate the extensive government investigation and affords the defendants appellees an opportunity to escape without admission of guilt.

The public funds, manpower, and facilities employed by the Department of Justice in its investigation of this matter far exceed the resources available to any other plaintiff. The consent decree, however, renders useless the results of the Antitrust Division efforts

and expenditures. The decree completely denies to the public, which has been injured by defendants' violation of the antitrust laws, any benefit from the government investigation. Not only does the decree specify that it is neither evidence nor an admission of guilt; it omits any provision for the release of information or evidence to private litigants.

The omission of any assistance to or protection of individual litigants suing in the public interest runs contrary to the frequently stated policy of the antitrust laws. The County and District's main objection here is that the public interest in treble damage antitrust enforcement, as expressed by the Congress, a President of the United States, and the Supreme Court, is not protected at all by this decree. The District Court did not merely record an agreement of the parties; it made an independent judicial determination as to the *adequacy* of the decree in protecting the public interest. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The decree should have contained provisions to secure the benefits of the government action herein for private and public litigants.

Both *amici* and appellant proposed modifications to the decree prior to its entry by the District Court. Those modifications were to have provided the assistance contemplated by Congress to private litigants so that they might have made meaningful use of the expenditure of public funds and the efforts of government officials in the investigation of this matter. For

example, the modifications would have thus enabled the County of Los Angeles and the Los Angeles County Air Pollution Control District to effectively take up the role planned for them as the other arm of antitrust enforcement. The partnership between federal and "private" plaintiffs envisaged by Congress would thus have operated as a truly substantial weapon by combining the investigative resources of the federal government with the incentive of compensation by treble damages for persons injured by the conduct of the defendants-appellees.

The primary requested modifications included the following:

> a. The inclusion of a limited admission of guilt to give the consent decree *prima facie* effect under Section 5(a) of the Clayton Act; and,
>
> b. The inclusion of terms in the decree which would have impounded the evidence gathered by the government and make it available to private litigants.

A. The Decree Should Have Included a Limited Admission of Guilt.

When the judgment was signed, there should have been included in the decree a limited admission that the defendants violated the Sherman Act as charged in the government complaint. This admission (commonly known as an "asphalt clause") would have been solely for the purpose and to the extent necessary

to give *prima facie* effect to the decree in public and private treble damage actions. The Department of Justice has previously recognized the need to cooperate with "private" litigants in pursuit of its obligation to further the public policy established by Congress. The Department has accomplished this objective by providing for such limited admissions of guilt as part of its consent decrees. The consent decrees in *United States v. Lake Asphalt and Petroleum Co. of Massachusetts*, 1960 CCH Trade Cas. par. 69, 835 (D.Mass., 1960); *United States v. Bituminous Concrete Association, Inc., et al.*, 1960 CCH Trade Cas. par. 69, 878 (D.Mass., 1960), and *United States v. Allied Chemical Corp., et al.*, 1961 CCH Trade Cas. par. 69, 923 (D.Mass. 1961) included specific provisions admitting guilt for purposes of private actions by state and local governments which followed federal government suits. The decrees in each of these cases contain approximately the following language:

> ". . . defendants having admitted the allegations contained in the government's complaint herein, solely for the purpose and to the extent necessary to give the following adjudication the *prima facie* effect stated in Section I below in the suits specified below, and for no other purpose . . .
>
> "I. That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for

the sole purpose of establishing the *prima facie* effect of this Final Judgment, in the suits specified below, and for no other purpose.

"Each defendant is enjoined and restrained from denying that this Final Judgment has such *prima facie* effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such *prima facie* evidence or from asserting any defense with respect to damages or other defenses available to it." (The decree then sets out the state private actions to which the decree applies.) (1960 CCH Trade Cas. at par. 77, 272).

The consent decree in this case permits the defendants to avoid an adjudication or admission of their guilt by agreeing simply to refrain in the future from repeating acts which have already succeeded in their purpose. The decree enables the defendants to deny to members of the public victimized by their conduct any benefit from the government action and will require each litigant to attempt to duplicate the Antitrust Division's expenditure of funds and personnel in a reinvestigation of the same matters and issues referred to in the government complaint. Moreover, a reinvestigation and the filing of new actions will adversely affect the public interest by substantially postponing the trial of this matter. In *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F.Supp. 540 (E.D.Pa., 1967) the court, in refusing to delay discovery proceedings in a private treble

damage suit which paralleled a government criminal antitrust action, stated:

> "From the specific enforcement role given the private treble damage plaintiff by Congress, it is easy to discern a Congressional interest in the expedited trials of such actions. It would be anomalous to conclude otherwise. The antitrust laws, themselves, function as the Congressional blueprint designed to keep the American economy operating within the free enterprise guidelines mapped out under these statutes. Any threat to the free enterprise footings of our national economic superstructure, constitutes, in Congress' judgment, an immediate and serious threat to our national welfare. *The strong incentive of triple recovery encourages private litigants to vigorously enforce the antitrust laws.* Against this backdrop, unwarranted stays of proceedings stymie and offset any incentive otherwise contained in the possibility of triple recovery. Delay tends to discourage prosecution of civil litigation. As time passes, memories of witnesses fade. The inherent value of a claim for damages, enhanced by potential triple recovery, diminishes." (269 F. Supp. at 542) (emphasis added).

The government investigation took many years even with the vast resources, facilities, manpower, and money at its disposal. The duplication of that effort and expense by private litigants must, of necessity, create a serious delay in the trial of *amici's* cause. The plain fact is that nobody else has the facilities, manpower, and money to duplicate the effort.

B. Appellant, Amici, and Other Private Litigants Are Entitled to Preserve the Availability of Evidence Gathered in the Government Action.

During the course of the government's investigation, documents were submitted to the Antitrust Division by the defendants, co-conspirators, and other persons. These documents were submitted both voluntarily and pursuant to subpoena. In addition, testimony was taken of a number of witnesses before the grand jury. We therefore seek this Court's protection of all the evidence gathered by the government in its investigation. There is, we believe, a serious danger that the documents collected by the government, if returned to the persons who submitted them, will be dispersed or destroyed. The identity and contents of such documents will thereby become physically unavailable to all litigants in the prosecution of their private treble damage actions. This could well be fatal to any private litigation, and would thus totally frustrate the national antitrust policy previously discussed. The courts and the Antitrust Division itself have recognized the existence of this problem and have sought to provide the private litigant with access to, or at the very least protection of, the evidence gathered by the government. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311, 319 (1965); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264-266 (9th Cir., 1964), cert. denied, 379 U.S. 960

(1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 729, 734-736 (N.D. Ill., 1962); *United States v. Harper & Row Publishers, Inc. and Related Cases*, 67 C 612 through 67 C 629 (N.D. Ill., Nov. 20, 1967, unpublished); *H. P. Hood & Sons, Inc.*, Docket No. 7709, 58 F.T.C. 1184, 1189-1190 (1961); *Antitrust Handbook*, Federal-State Conference on Antitrust Problems, U.S. Dept. of Justice (1969), p. 65.

This Court, in *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311 (1965), discussed the benefits to private litigants from prior government actions contemplated by Congress in Section 5 of the Clayton Act. Among these benefits, according to this Court, was access to the documentary evidence marshalled by the government. The Court stated:

> "The government's initial action may aid the private litigant in a number of other ways. Pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR par. 1.132(c) (1960) See generally 16 CFR par. 1.131 et seq. (1960) . . . The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties. See Bicks, "*The Department of Justice and Private Damage*

Actions," 4 Antitrust Bull. 5 (1959); Loevinger, "*Handling a Plaintiff's Antitrust Damage Suit*," 4 Antitrust Bull. 29 (1959)." (381 U.S. at 319).

In *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), cert. denied, 379 U.S. 900 (1964) the Court of Appeals for the Ninth Circuit held that the exemption of consent decrees from the operation of Section 5(a) of the Clayton Act did not give defendants a right to non-disclosure for an indefinite perior of time or the right to withhold information which would otherwise be available to other litigants who might have need of it. The Court also stated:

> "It is immaterial that Olympic could possibly obtain the same information through the process of propounding its own interrogatories to Standard and General. *It is entitled to know what those companies* and the alleged co-conspirators *told the Government*, and this requires examination of the documents which were exchanged, or exchanged and filed in that action." (332 F.2d at 266) (emphasis added).

In the so-called Electrical Equipment cases (*Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 211 F. Supp. 729 (N.D. Ill., 1962), one of the significant pre-trial developments was the entry of an order requiring each defendant in the private litigation which followed the government criminal action to place in a central depository copies and lists of various corporate documents that had been submitted to Philadelphia grand juries investigating the industry.

The Federal Trade Commission in *H. P. Hood & Sons, Inc.*, Docket No. 7709, 58 F.T.C. 1184 (1961) refused the respondent's request that its documents be placed under seal to avoid exposure to possible treble damage plaintiffs. The Commission stated:

> "Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for secreting this evidence. Placing documents '*in camera*' for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. In enacting Section 4 of the Clayton Act (15 U.S.C. 15), which provides in part that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages . . . .'; Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. This Congressional purpose has been recognized by the Supreme Court in *Lawler v. National Screen Service*, wherein the Court, holding that the circumstances of that case did not bar the action as *res judicata*, stated:
>
> > 'Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private damage action.'
>
> "Thus, in our view, the secretion of evidence for the purpose of frustrating possible treble damage plaintiffs would be opposed to the public interest and the clearly expressed will of Congress. Our ef-

> forts should be directed to aiding, not hindering, private enforcement of the antitrust laws." (58 F.T.C. at 1189-1190)

The Antitrust Division itself has recognized the need for preserving the availability of documents for use by plaintiffs in private actions which follow government suits. Thus, in *United States v. Harper & Row Publishers, Inc. and Related Cases*, No. 67 C 612 through 67 C 629 (N.D. Ill., Nov. 20, 1967, unpublished) the District Court entered an order without objection from the Antitrust Division finding:

> "... that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions."

The Court then ordered the documents retained in the custody of John E. Sarbaugh, Chief of the Mid west Office of the Antitrust Division, pending further order of the Court.

The Antitrust Handbook, compiled by the Antitrust Division for the Federal-State Conference on Antitrust Problems (1969) indicates that the Division subscribes to the concept of preserving evidence gained in its cases. The manual quotes from the statement of this Court in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, *supra*, concerning the availability of documents and other evidence. The *Handbook* then states:

"The above statement [from *Minnesota Mining and Manufacturing*] referred to Federal Trade Commission actions, but the same can be said about Department of Justice actions. The plaintiff does not necessarily obtain the relevant documents as a result of the federal action, but he learns of their existence and identity and knows what to seek when he resorts to discovery procedures. Discovery may be simplified by seeking and impounding order, under which documents discovered by the Federal Government are not directly returned to the defendants from whom they were discovered. This prevents their dispersal or destruction, and those which the damage plaintiff is entitled to discover may be obtained from a central depository." *Antitrust Handbook*, p. 95.

The *Handbook* also notes that the impounding order and central depository procedure was followed in the *Harper & Row Publishers* case cited above.

In the instant matter, an order of this Court not impounding the government's evidence and making it available to appellant and others and to other private litigants is necessary to protect the interests of private litigants.

IV. THE CONSENT DECREE ENTERED BELOW IS NOT IN THE PUBLIC INTEREST

A. Introduction.

On page 6 et seq. of their Memorandum, the defendants-appellees argue that the "competitive benefits" of the industry have reduced emissions of hydrocarbons and carbon monoxide from new cars. Nothing is said about oxides of nitrogen, which is understood not to be disputed that no emission control device [illegible] adopted mandatory [illegible]

Nowhere do defendants-appellees show how the competitive benefits [illegible] anything like [illegible] ultimate city benefits [illegible] pollutant and [illegible] would have [illegible] pleased to [illegible] the [illegible] of the combination.

B. The Benefits of the Consent Decree

[illegible] that the benefits of the decree outweigh the "competitive benefits" [illegible] appellees [illegible] prevent the defendants-appellees from [illegible] and neither [illegible]

At page 19 of the Memorandum which defendant-appellees filed in the District Court, a rather [illegible] statement is made. To quote:

> "The petitioners for intervention and of demanding a public trial in this case appear t[illegible] hopeless of the braking effect of extended lit[illegible] toof on the continuing efforts to reduce air po[illegible] tion."

We seriously doubt that such a trial would "bra[illegible] the efforts to reduce air pollution. Certainly the [illegible] would not have thwarted such efforts by defendant-appellees, the government's complaint was filed [illegible] easily because defendants-appellees all really were [illegible] spring to keep progress in this area at a standstill [illegible] any event, the industry will have to comply with [illegible] law. The three authorities consulted by the Departm[illegible] of Justice (Memorandum, p. 19) have no particular [illegible] perties in this matter.

The real benefit of the consent decree is plainly [illegible] the automobile manufacturers. The "cooperative efforts" having saved the industry billions of dol[illegible] they now are to be protected from [illegible] a trial and "prima facie" evidence [illegible] Section [illegible] Clayton Act, 15 USC Sec. 16.

The benefits to the public of a [illegible] trial w[illegible] be enormous. Not only could [illegible] suffer[illegible] dress, but the continued effect on the industry would [illegible] compare present and future compliance with anti[illegible] laws.

C. The Statutory Policy Argument.

Defendants-appellees argued (Memorandum, p. 20, *et seq.*) that the statutory policy favors consent decrees. We think it does not. In Part III of this Section, above, we have shown that the statutory policy as expressed by the courts and by Congress is to assist private litigants so that their actions would aid in enforcement of the Act. The reason for the "*prima facie* evidence" provisions is to aid them in this effort. Consent decrees, whereas they have utility in some cases, are nowhere favored as "statutory policy."

There is nothing in the law which requires a court to approve a decree just because the defendants have consented to it. If there were, some of the cases permitting intervention in such matters would not have been so decided. In short, we contend that if the approval of the consent judgment is not in the public interest because it will foreclose the use of the "*prima facie* evidence" clause, then it should be disapproved completely.

As the Court stated in *United States v. Standard Ultramarine and Color Company*, 137 F. Supp. 166 (S.D.N.Y., 1955):

> "If violators may expiate their wrong-doing by payments of token fines, by accepting the proverbial 'slap on the wrist' and to boot, avoid the impact of Sec. 5, then a powerful deterrent to law violation has been removed."

D. The Interest of Amici IS the Public Interest

Defendants-appellees suggested at page 31 of their Memorandum that the only interest of *amici* was to further their own damage actions, and that this was not sufficient. The County and the District are not interested primarily in damages. We have specific responsibilities in public health and in air pollution control. As shown in this brief, these parties have a public interest to protect in the judgment. Indeed, these parties have a much more direct interest than did the parties who were permitted to intervene in *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, [illegible] U.S. [illegible] (1967). The health and safety of at least 2,000,000 people are our responsibility. Our ability to protect that health and safety, and property, has been severely restricted by the action of defendants-appellees.

Defendants-Appellees suggested that the *Cascade* case *supra*, was in effect overruled by this Court in *per curiam* decisions. The fact is that the *Cascade* case is the latest expression of this Court. Defendants-appellees also suggested that the decision was "peculiar." What they do not say is why the "special factual situation" restricts the holding of the *Cascade* case.

[illegible]

E. Adequate Representation by The Department of Justice.

Defendants-appellees asserted that our interests were adequately represented by the government. It is obvious from the cases which have permitted intervention that this is not to be assumed. The government has demonstrated little interest in air pollution control in this case. Our interests are much broader than in enjoining the continuation of a combination which has already served its purpose. A trial of this case would have had far reaching effects upon the future actions of this industry and of other industries. Successful civil actions based upon a favorable judgment for the government would have been even more effective. None of the appellees now before this Court have shown any interest in protecting the rights of persons whose health has been damaged as a result of air pollution. The fact that the public interest was not represented below is illustrated by the number of petitions and objections that were filed with the District Court.[8]

SUMMARY OF ARGUMENT

I

THE CONSENT JUDGMENT FRUSTRATES ACCESS TO THE FACTS OF THE ALLEGED CONSPIRACY.

The decree entered in the District Court effectively prevents persons with meritorious causes of action from securing the information they need to plead and prove the facts of the alleged conspiracy. It is not at all certain that through discovery proceedings and motions, private litigants could discover these facts. Witnesses will have died or forgotten facts, or be unavailable after 15 to 20 years have passed. Even assuming a battery of trained attorneys and unlimited funds, many of the facts nevertheless will be lost forever.

II

THE DECREE FAILS TO PROVIDE SAFEGUARDS NECESSARY TO PROMOTE THE CONGRESSIONAL PURPOSE OF ASSISTING INDIVIDUAL LITIGANTS.

The law provides for private suits and treble damages partly to permit those injured to recover their damages; as well it is another mechanism through which the antitrust law may be enforced. It is the policy of the law, in fact, that private enforcement be an effective added deterrent to the violation of the antitrust laws. The interest of Congress in preventing further combinations by this means will be frustrated if

such suits are made so difficult and expensive that they cannot be successfully prosecuted.

The consent judgment in this case would have been *prima facie* evidence of the conspiracy at least via the insertion of an "asphalt clause." There is precedent for such provisions, and they would provide real penalties not present in the consent judgment.

The material collected over several years of investigation by the United States will be essentially lost unless the transcripts and documents are revealed. Now that the decree has been signed, documents may be placed out of reach of public agencies and private litigants who require them. An order to impound and to reveal the information collected would prevent this loss.

III

THE CONSENT DECREE ENTERED BELOW IS NOT IN THE PUBLIC INTEREST.

As noted, the consent decree will not be effective. The conspiracy alleged has been successful, and has already accomplished its purpose. The real benefit of the judgment is to the defendants-appellees in avoiding a public trial and the lawsuits which would follow it.

The benefits of a successful trial to the public would have been enormous. The door would have been opened for private damage actions that would not only afford redress to injured parties, but also would have a financial impact on the industry encouraging present and

future compliance with the antitrust laws. Unfortunately, the industry is now protected from both a public trial and the *"prima facie* evidence" provision of Section 5 of the Clayton Act (15 U.S.C. Sec. 16). The decree effectively sanctions a conspiracy that has saved the industry billions of dollars while costing the public an amount that may never be possible to determine.

CONCLUSION

The County of Los Angeles and the Los Angeles County Air Pollution Control District, *amici* herein, are firmly convinced that the consent decree entered below is virtually useless, and that this case should have gone to trial with appellant, *amici*, and perhaps others as parties plaintiff.

We feel that the decree itself, the discussion in the brief, and the firm opposition of the United States to the various applications to intervene below all demonstrate that the public interest has not been protected.

It is our feeling that the antitrust policy of the Federal Government should reflect a concern for the collateral effects of industrial conspiracies. In this particular case the consent decree, while meeting the basic economic problems posed by the government's complaint, wholly ignores the more fundamental issues of environmental deterioration and public redress for the same.

To quote from the Jurisdictional Statement filed by appellant City of New York, at page 11-12:

"The procedure followed in the district court raises questions of fundamental importance in the administration of the antitrust laws. These questions, which are as difficult as they are significant, should be resolved following full briefing and argument. Since the City's right to intervene depends upon the resolution of the other issues presented, an order should be entered postponing consideration of the question of jurisdiction until the hearing of the case on the merits. *Sun Oil Publishing Co. v. United States*, 356 U.S. 683."

Only in this way can complete justice be assured. In any event, the fruits of the Federal investigation must not be lost, for they are irreplaceable.

Respectfully submitted,

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